

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of new)	NOTICE OF ADOPTION
rules I through XVIII pertaining to)	
decontamination of inhabitable property)	(METHAMPHETAMINE CLEANUP
contaminated by clandestine)	PROGRAM)
manufacture of methamphetamine)	

TO: All Concerned Persons

1. On January 26, 2006, the Department of Environmental Quality published MAR Notice No. 17-243 regarding a notice of public hearing on the proposed adoption of the above-stated rules at page 142, 2006 Montana Administrative Register, issue number 2.

2. The department has adopted New Rules I through VIII (17.74.501 through 17.74.508) and X through XVIII (17.74.510 through 17.74.518) exactly as proposed and has adopted New Rules III (17.74.503) and IX (17.74.509) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE III (17.74.503) INCORPORATION BY REFERENCE (1) through (1)(d) remain as proposed.

(2) Copies of these materials may be obtained from the Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901. Copies of the CFR are available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402; phone (202) 512-1800. The CFR also can be accessed electronically at ~~http://www.access.gpo.gov/nara/cfr/index.html~~ http://www.gpoaccess.gov/cfr/index.html.

NEW RULE IX (17.74.509) WORKER AND SUPERVISOR CERTIFICATION

(1) An applicant for department certification as a CML decontamination worker shall successfully complete a basic decontamination worker course and submit to the department within 60 days after completing the course:

(a) remains as proposed.

(b) evidence of successful completion of hazardous waste operations and emergency response (HAZWOPER) training including the initial 40-hour HAZWOPER and current eight-hour HAZWOPER refresher training, conducted pursuant to 29 CFR 1910.120;

(i) HAZWOPER training, required pursuant to (1)(b), must be completed prior to taking the basic decontamination worker course;

(c) through (5) remain as proposed.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: A comment was received requesting the amendment of NEW RULE VI to require the department to add to the department's list of contaminated properties maintained pursuant to 75-10-1306, MCA, contaminated properties identified by certified contractors.

RESPONSE: The department disagrees with the requested amendment. Section 75-10-1306(1), MCA, states that law enforcement agencies are required to report clandestine methamphetamine (meth) drug labs to the department. Notably absent from the statute is a requirement that certified contractors must report clandestine meth drug labs to the department. In the absence of authorization from the legislature to require certified contractors to file such reports, the department may not create such a requirement by rule.

Section 75-10-1306(2), MCA, states that the department shall maintain a list of properties that have been reported, but does not specify whether the department may accept reports only from state and local law enforcement agencies. The question arises, then, whether the department may accept voluntary reports from certified contractors or, for that matter, any other persons or entities. Upon consideration, the department has determined that accepting reports from entities other than those designated by the legislature potentially could pose significant problems, not the least of which would be ensuring that properties are not inappropriately listed. The department does not have the resources to investigate all reported properties itself and must rely on the accuracy of the reports. Accordingly, the department is taking the prudent course of accepting only reports as mandated by the legislature. However, any certified contractor or other citizen is free to report a suspected clandestine meth drug lab to a local or state law enforcement agency. The local or state law enforcement agency is required to report the property to the department once it becomes aware that the property was the site of a clandestine meth drug lab.

COMMENT NO. 2: New Rule I(3) states that this is a "voluntary program which provides a property decontamination process." Once the owner sees the cost involved there will not be a cleanup done in accordance with these rules.

RESPONSE: Section 75-10-1301, MCA, states: "The purpose of this part is to protect the public health, safety, and welfare by providing specific cleanup standards and authorizing the department to establish a voluntary program that will provide for a property decontamination process that will meet state standards." The department is authorized by the legislature only to establish a voluntary program. Therefore, the proposed administrative rules only can establish a voluntary program.

The department is aware that a property owner may believe that the prospective cost of cleanup might outweigh the benefits derived from remediation of inhabitable property. However, if the property owner declines to clean up the property, the statute still provides protection to the public by requiring the property owner to provide notice of the contamination to future occupants and purchasers.

COMMENT NO. 3: Please add language stating that the cleanup process provided for under these rules is to occur after removal of gross chemicals and lab equipment by law enforcement agencies and their contractors has been completed.

RESPONSE: This point would be addressed in the worker and supervisor

certification training classes.

COMMENT NO. 4: How will the cleanup contractor know that the building, room, etc. is released from legal investigation requirements and is ready for cleanup?

RESPONSE: This comment is outside the scope of this rulemaking. However, the department contacted the Missouri River Drug Task Force and was informed that a site always will be marked by law enforcement for purposes of their investigation. The property owner is responsible for hiring the cleanup contractor. It is the responsibility of the property owner to inform the cleanup contractor when the legal investigation has been completed and the property has been released for cleanup.

COMMENT NO. 5: Will homeowners be allowed to clean up their own property? If so, will they be allowed to transport the material to the landfill?

RESPONSE: The new rules do not prohibit homeowners from cleaning their own property and/or transporting solid waste material to a licensed landfill. However, if an owner of property used for clandestine meth manufacture that has been reported as contaminated to the department wants to have the property removed from the department's list of contaminated property, then the property owner must comply with New Rule VI, "Decontamination Performance, Assessment, and Inspection."

The property owner must adhere to Administrative Rules of Montana (ARM) Title 17, chapter 50, concerning the regulation of solid waste (landfills), and ARM Title 17, chapter 53, concerning the regulation of hazardous waste, including the transportation of hazardous waste. A property owner should call the department at (406) 444-5300 with any questions about transporting contaminated materials to landfills or any other issue regarding the proper cleanup of meth contaminated property.

COMMENT NO. 6: Who inspects the property and certifies it for re-occupancy?

RESPONSE: New Rule VI(2) states: "Upon confirmation by the department that an inhabitable property has been properly remediated to the standards provided in NEW RULE V, the department shall issue a certificate of fitness to the property owner of record." To ensure that a property has been remediated, the department will consider the analytical results provided by a certified contractor and, in certain cases, may also inspect the property.

COMMENT NO. 7: Has there been a cost analysis performed on how much it would cost to remediate an average house or room? As the department reviewed other states' programs, did they have cost analyses? Where is the money to do this work? Will insurance cover the average homeowner or commercial property owner? Insurance agents state that landlord protection policies list meth labs as contamination that is not covered under the "pollution or contamination exclusion" clause of the policy. If the average owner cannot afford to clean up the property and insurance does not cover cleanup, how can properties be cleaned under this

program? Will such property remain abandoned/vacant, awaiting a fire or deterioration?

RESPONSE: This comment is outside the scope of this rulemaking. However, the department provides the following response.

The department has not performed a formal cost analysis because of the variability in meth lab sites, amount of contamination, and rates charged by cleanup companies. The department hopes that, by providing a standard to which a property can be cleaned, and, by certifying cleanup contractors to perform the work, a fair market will develop to make it cost effective for property owners to restore dwellings to an inhabitable state.

COMMENT NO. 8: Are state and local governments going to maintain databases of meth lab contaminated properties?

RESPONSE: The department has developed a database for contaminated properties listed pursuant to 75-10-1306(2), MCA, certified workers, certified supervisors, and certified contractors.

COMMENT NO. 9: How will the cleanup and recertification process be enforced? Is it a voluntary program until a complaint is issued? What follow-up will be performed on these properties to assure that they are cleaned up? Is there a timeframe within which the owner is to take action or provide an action plan?

RESPONSE: The department will determine whether cleanup is complete by reviewing the cleanup contractor's sampling and analysis work and by comparing analytical results to the decontamination standards. Because it is a voluntary program, there are no timeframes for cleanup action. However, if an owner of property used for clandestine meth manufacture, that has been reported as contaminated to the department, wants to have the property removed from the department's list of contaminated property, the property owner must comply with New Rule VI, "Decontamination Performance, Assessment, and Inspection."

COMMENT NO. 10: How will someone know that a house was a former meth lab and that it has been certified for reoccupancy?

RESPONSE: A person won't necessarily know that a house was a former meth lab but that a person can check the department's list to determine whether the property currently is contaminated. As discussed in Response to Comment No. 6, upon confirmation by the department that an inhabitable property has been properly remediated to the required standards, the department will issue a certificate of fitness to the property owner of record and remove the property from the list of contaminated properties.

COMMENT NO. 11: Is there a disclosure requirement such as for lead based paint and radon?

RESPONSE: Section 75-10-1305, MCA, requires the owner of inhabitable property that has been contaminated by use as a clandestine meth drug lab to give written notice to any subsequent occupant or purchaser of that fact if the property has not been remediated by a certified contractor to the standards set forth in 75-10-1303, MCA.

Please also see the Response to Comment No. 12.

COMMENT NO. 12: What measures will be used to prevent reoccupancy without prior cleaning?

RESPONSE: Section 75-10-1305(1), MCA, states: "An owner of inhabitable property that is known by the owner to have been used as a clandestine meth drug lab shall notify in writing any subsequent occupant or purchaser of the inhabitable property of that fact if the inhabitable property has not been remediated to the standards established in 75-10-1303, MCA, by a contractor who is certified in accordance with 75-10-1304, MCA." However, the statute does not provide for enforcement by the department, and it is possible that subsequent occupants or purchasers would need to seek recourse through litigation against an owner who fails to give such notice.

COMMENT NO. 13: How will the public and local governments be notified of this program?

RESPONSE: The Montana Administrative Procedure Act specifies the rulemaking procedures, including public notification and participation procedures, applicable to this rulemaking. The department filed a notice of proposed rulemaking with the Secretary of State's Office on January 13, 2006, the notice was published in the Montana Administrative Register, and a public hearing was held on March 7, 2006. The department accepted comments on the proposed rules through March 14, 2006. Also, the department mailed the proposed rules to the meth cleanup program's interested parties list on January 23, 2006. The rules, in their final format, will be published in the Administrative Rules of Montana in approximately early September 2006 and may be obtained by contacting the Methamphetamine Lab Cleanup Program at P.O. Box 200901, Helena, Montana 59620-0901, phone (406) 444-5286, e-mail DGrimm@mt.gov, or on the department's website at <http://www.deq.mt.gov/dir/legal/title17.asp>.

COMMENT NO. 14: Although the department incorporated the state rules on hazardous waste and asbestos, how will a property owner know what to do?

RESPONSE: The department removed the incorporation of the hazardous waste and asbestos rules from the proposed rules. Property owners may call the department at (406) 444-5300 if they have questions about asbestos or hazardous waste. Property owners also may contact a certified contractor who, by training and agency oversight, will recognize these and other regulatory issues.

COMMENT NO. 15: The training provided by Marine & Environmental Testing, Inc., duplicates HAZWOPER training.

RESPONSE: This comment is outside the scope of the rulemaking. However, the department agrees that the inaugural training was duplicative, and the department is taking steps to ensure that future training is more focused on the specifics of meth cleanup. New Rule XIV requires training providers seeking certification to obtain department approval of instructors and course content. New Rule XV states that training providers must allow the department's representative to attend training courses as an observer to verify that the training provider conducts

the training in accordance with the training approved by the department.

COMMENT NO. 16: The proposed rules do not adequately address quality assurance and quality control.

RESPONSE: The department believes that the standardized methods and associated quality assurance and quality control publications incorporated by reference in New Rule III and included in the Montana Clandestine Methamphetamine Lab Decontamination Sampling and Analysis Plan provide the quality assurance and quality control requirements necessary for the meth cleanup program.

COMMENT NO. 17: The rules lack language requiring property owners to decontaminate their property. This is a voluntary program and does not include a decontamination requirement before a dwelling is used for habitation. Where is the incentive?

RESPONSE: Please see the department's Response to Comment No. 2.

COMMENT NO. 18: HAZWOPER training should be completed before a person can take the clandestine meth lab worker certification course.

RESPONSE: The department agrees with the comment, and the department has revised New Rule IX to include this requirement.

COMMENT NO. 19: The term "voluntary," as used in New Rule I, could be construed by a property owner to mean that the rules can be ignored if the owner so chooses, contrary to the legislature's intent that property be decontaminated or that written notification be provided to subsequent occupants that the property has been used as a clandestine meth lab.

RESPONSE: The sentence in New Rule I that contains the term "voluntary" is paraphrased from a similar sentence in the clandestine meth laboratory statute, Section 75-10-1301, MCA. The statutes and rules both make it clear that property owners may choose not to have their property decontaminated, and that the cleanup provisions, therefore, are voluntary. However, if decontamination is not performed, notification is mandatory.

COMMENT NO. 20: Of the three methods referenced in New Rule III for sampling and analysis of a CML, the method referenced in (1)(b) of the rule is for analysis of asbestos by transmission electron microscopy, the method in (1)(c) is for surfaces contaminated by lead paint, and the document referenced in (1)(d), apparently, does not exist as a stand-alone document. This could be very confusing to individuals or businesses seeking to evaluate a contaminated property prior to, and after, cleanup.

RESPONSE: The microvacuuming method (American Society for Testing and Materials, Method D5756-02, (November 2002), Standard Test Method for Microvacuum Sampling and Indirect Analysis of Dust by Transmission Electron Microscopy for Asbestos Mass Concentration) and the wipe sampling method (National Institute for Occupational Health and Safety, Manual of Analytical Methods, 4th Ed., Method 9100, Lead in Surface Wipe Samples (Issue 2, May 1996)) are

referenced in most, if not all, state clandestine meth lab cleanup programs. The Montana Clandestine Methamphetamine Lab Decontamination Sampling and Analysis Plan (August 2005) does exist as a stand-alone document and can be obtained from the Montana Methamphetamine Cleanup Program.

COMMENT NO. 21: Subsection (1)(b) of New Rule IV defines "basic course" as training for workers and supervisors. However, the rules require that a supervisor take an additional course beyond the basic course. There is no definition of "supervisor course" in the new rules, and a definition should be added.

RESPONSE: Sections (1) and (2) of New Rule XI define "supervisor course."

COMMENT NO. 22: The new rules should address the need for pre- and post-cleanup site assessments by qualified individuals, including sampling plans and analytical results. The pre- and post-cleanup assessments should be performed by third party professionals who are not affiliated with the contractor doing the actual cleanup.

RESPONSE: The clandestine meth laboratory statutes, 75-10-1301 through 75-10-1306, MCA, do not provide the authority for the department to adopt administrative rules to require pre- and post-cleanup assessments performed by third party professionals who are not affiliated with the contractor doing the actual cleanup. However, the department intends to perform random follow-up and on-site confirmation sampling to document post-assessment and/or cleanup effectiveness. If it becomes apparent that additional oversight is needed, the department may pursue a legislative amendment authorizing such a rule requirement.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

By: /s/ Richard H. Oppen
RICHARD H. OPPER
Director

Certified to the Secretary of State, April 10, 2006.